

## Computer Says No:<sup>1</sup> Enforcing divorce upon persons who changed their sex in Europe and South Africa

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### Abstract

As is the case with marriage, divorce should be entered into freely and voluntarily. The State should not demand that a marriage be ended if neither one of the spouses wishes for it to be terminated. Yet, several countries still impose such an obligation in instances where one or both of the parties to the marriage changed their sex during the existence of the marriage, in order for such a person to attain legal recognition of the sex change. This article analyses some of the case law in Europe and South Africa where the courts have had to intercede in instances in which differential treatment was being justified in the name of so-called pragmatism. It examines some of the possible reasons for imposing this obligation upon married couples and the effect that this requirement has on their lives. Furthermore, it explores why it is incorrect to require the termination of marriage after a change of sex, how genderism and transphobia has caused differential and discriminatory treatment of transsexual persons, and how institutional bias and a lack of appreciation for the lived reality of people who do not necessarily fit into categories of generated systems, continue to negate the human rights of some humans.

### Keywords

Forced divorce; requirements for alteration of sex

### Biography

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<sup>1</sup> 'Computer Says No' is the colloquial name given to "an attitude in customer service in which the default response is to check with information stored or generated electronically and then make decisions based on that, apparently without using common sense, and showing a level of unhelpfulness whereby more could be done to reach a mutually satisfactory outcome, but is not." "Computer says no" Wikipedia, available at [https://en.wikipedia.org/wiki/Computer\\_says\\_no](https://en.wikipedia.org/wiki/Computer_says_no) (accessed on 28/06/2018). The name became a common phrase mainly through the use thereof in the popular British television sketch show, *Little Britain*. I am grateful to the anonymous reviewers and the editor of this special edition of the journal for their valuable comments and suggestions. All errors that remain are due to my stubborn persistence.

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## 1. Introduction

International law protects the right to get married and establish a family. Thus, for example, it is stated in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) that “[m]en and women of marriageable age have the right to marry and to found a family”.<sup>3</sup> Marriage should be entered into freely and voluntarily, with the consent of both parties.<sup>4</sup> It is also explained that the State should assist and protect the family unit.<sup>5</sup> Therefore, it can be said that termination of marriage through divorce also should be entered into freely and voluntarily, with the consent of (at least one of) the parties. Yet, as at May 2019, 32 states in Europe and Central Asia still break up marriages and families by imposing compulsory divorce upon married couples if one of the spouses has changed their sex (Trans Rights Europe & Central Asia, 2019).<sup>6</sup> In these states, a person’s sex change will not be given official recognition in the instance where such a person has decided to remain committed to the spouse to whom they promised to remain married. Instead, this person will have to explain why their appearance does not resemble that of the picture presented in their official identity documentation and that they are not trying to deceive anyone or commit fraud, purely because the person has remained true to their wedding vows.

Fortunately, a number of states have recognised that this violation of human rights cannot be tolerated and have amended their national legal position accordingly.<sup>7</sup> Admittedly, many of these legislative amendments only were effected as a result of a court instructing the State to do so, but in these jurisdictions a married couple is no longer forced to terminate their marriage in order to enable one spouse to exercise the right to legal gender recognition. This article will briefly describe some of the domestic case law in Europe that led to the legislative amendments. It will also reflect on a recent decision of 2018 in which the Court of Justice of the European Union (CJEU) held that a UK citizen who had changed sex, cannot be required to annul the

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<sup>3</sup> Art 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. See also Art 16 of The United Nations Universal Declaration of Human Rights, 1948.

<sup>4</sup> See, for example Art 23(3) of the International Covenant on Civil and Political Rights, 1966, providing that “[n]o marriage shall be entered into without the free and full consent of the intending spouses”.

<sup>5</sup> See Art 10 of the International Covenant on Economic, Social and Cultural Rights, 1966; Art 23 of the International Covenant on Civil and Political Rights, 1966; and Art 18 of the African Charter on Human and Peoples’ Rights, 1981.

<sup>6</sup> For example, in Japan, s 3(1)(2) of the GID Act 2003 provides that trans persons “may not be married, insofar as [they intend] to obtain legal recognition” (Dunne, 2018).

<sup>7</sup> See, for example, New Zealand, Australia, Malta, Uruguay, Argentina, Mexico City, Scotland, England and Wales, and a number of other European states, as explained by (Open Society Foundations, 2014, pp. 7-8).

marriage entered into prior to the change, in order to receive sex-specific social security benefits to which that person is entitled. (*MB v Secretary of State for Work and Pensions*, 2018).<sup>8</sup>

The article will then focus on how a South African court had to take a different course of action: in *KOS and others v Minister of Home Affairs and others 2017*,<sup>9</sup> there was no legislation in force that required the dissolution of a marriage for full legal gender recognition to be provided by the State. The Court, instead, had to instruct a governmental department to adhere to, and execute its legislative duties, instructing them to provide full legal gender recognition to the applicants, as provided for in the Alteration of Sex Description and Sex Status Act.<sup>10</sup> The article seeks to reiterate why it is incorrect to require the termination of marriage post a change of sex. It will argue that genderism and transphobia are responsible for both legislation requiring divorce of a married couple subsequent to a sex change, as well as the institutional bias in governmental departments who fail to provide transgender people equal opportunities and a dignified life. This lack of appreciation for the lives of people who do not necessarily fit into categories of generated systems, continues to negate the human rights of some humans.

## 2. Forced divorce case law in Europe

The first reported decision of this nature hails from the St Gallen District Court in Switzerland in 1996, at a time when same-sex marriages had not yet been recognised as valid in this country. Following genital surgery, a married trans woman applied to be registered as a woman but wished to remain married (Graham-Siegenthaler, 1998). The Court held that this would result in the recognition of same-sex marriage, something which the Federal Court in 1993 found to be against public policy (Graham-Siegenthaler, 1998). However, taking into account the interests of the applicant, her wife and that of the State, the Court held that such a marriage should be tolerated in this case. The Court recognised the importance of legal gender recognition and of protecting a functioning and existing marriage (Graham-Siegenthaler, 1998). As to the recognition of a marriage between persons of the same sex, the Court explained “that

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<sup>8</sup> *MB v Secretary of State for Work and Pensions*, judgment of the Court (Grand Chamber) of 26 June 2018, ECLI:EU:C:2018:492, available at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=203337&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&ci>, last accessed 20 July 2020.

<sup>9</sup> *KOS and others v Minister of Home Affairs and others 2017* (6) SA 588 (WCC), hereafter *KOS v Minister of Home Affairs*.

<sup>10</sup> 49 of 2003, hereafter the Alteration Act.

with this solution, a situation was created that had *de facto* already existed” (Köhler and Ehrt, 2016, p.53).

In 2006, an Austrian court<sup>11</sup> acknowledged that Austria’s Civil Code, at that point, reserved the right to marry to opposite sex couples only but regarded it as “inexplicable” that only unmarried persons could amend their entry in the register of births, deaths and marriages, subsequent to a sex change (Open Society Foundations, 2014, p. 8). In a matter decided in 2008 in Germany, the Constitutional Court found that section 8(1)(2) of the Law on the Amendment of Given Names and the Establishment of Gender in Special Cases (the Transsexual Act) of 10 September 1980 was unconstitutional in that it required persons to be unmarried as a condition for legal gender recognition. (BVerfG, Order of the First Senate of 27 May 2008, 2008); (International Commission of Jurists, 2008); (Köhler and Ehrt, 2016). In this case, the German law forced a transgender woman, who at the time of the decision of the Court, had been married for 56 years, to divorce her wife. The Constitutional Court ruled that this provision of the Transsexual Act substantially limited the transgender person’s rights to human dignity, free development of personality, life and physical integrity, non-discrimination and equality before the law, as well as rights to marriage and the family as enshrined by articles 1(1), 2(1), 2(2), 3(3) and 6(1) of the Basic Law for the Federal Republic of Germany (International Commission of Jurists, 2008). Once again, the Court emphasised the importance of preserving the marriage of the petitioner and her wife, explaining that the divorce requirement contained in section 8(1)(2) of the Transsexual Act, drove their relationship into an “existential crisis”, undermining its characteristic as “unchanged and irrevocably binding” (Köhler and Ehrt, 2016, p.55).

In France, the Rennes Court of Appeal in October 2012,<sup>12</sup> found that setting divorce as a requirement for official recognition of a change in sex was in breach of the right to private life, as enshrined by Article 8 of the ECHR (Köhler and Ehrt, 2016). The Court held that the validity of the marriage had to be determined at the time of its conclusion, and, since it originally involved a man and a woman, the marriage was valid (Köhler and Ehrt, 2016; International Commission of Jurists, 2012).<sup>13</sup> The Court

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<sup>11</sup> Austrian Constitutional Court Case V 4/06-7 (decided on 8 June 2006).

<sup>12</sup> Case No. 11/08743, 1453, 12/00535.

<sup>13</sup> However, see also decisions in Swedish courts in 2015, Case no 3201-14, 9 July 2015, confirmed in Case no 6186-14, 5 October 2015, where it was held that a trans man who gave birth to a child 12 years ago, when he was still registered as a woman, has to be registered as the “father” of the child in public records. The defendant, being the Swedish Tax Agency, had designated the petitioner as “biological mother,” and refused to change its records. Relying on, *inter alia*, the presumption that the person who gave birth to a child was always presumed to be the mother, the Tax Agency refused to register the

also said that it was unnecessary to rectify the couple's marriage certificate, since the trans spouse's birth certificate already stated that she was married (Köhler and Ehrt, 2016). In 2015, in Italy, the Supreme Court held<sup>14</sup> that transgender marriages had to remain valid until Parliament introduced a legally recognized union that was substantially equivalent to marriage for persons of the same sex (Köhler and Ehrt, 2016). The rules on the automatic dissolution of marriage in instances where one of the spouses changed their legal gender breached Article 2 of the Italian Constitution, which guaranteed "the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed" (Köhler and Ehrt, 2016, p.56). The Italian Supreme Court found forced divorce as a consequence of legal gender recognition of one of the partners, to be unconstitutional as long as there is no equivalent institution to a marriage guaranteeing substantially the same rights to the spouses (Köhler and Ehrt, 2016).

Following this line of reasoning, in the case of *Hämäläinen v Finland*,<sup>15</sup> the European Court of Human Rights (ECtHR) found that a divorce requirement attached to legal gender recognition does not cause a violation of the ECHR in instances where the possibility exists of converting a marriage into a comparable institution, such as a registered partnership CITATION Köh16 \l 1033 (Köhler and Ehrt, 2016) (*Hämäläinen v. Finland*, 2014). The applicant was a trans woman, who had married prior to her gender reassignment. A child was born to this couple from this marriage. Upon her application to have her status changed to female, the local registry office denied her request, based on legal provisions that required the spouses' agreement to turn their marriage into a registered partnership, or terminate their marriage CITATION Köh16 \l 1033 (Köhler and Ehrt, 2016). The applicant appealed, claiming that her wife was

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petitioner as the "father". The Swedish courts held that to keep the petitioner registered as the "biological mother" contradicted the decision to fully recognise his gender as a man, and has the potential to breach his right to respect for private life in terms of Article 8 of the ECHR. Although the petitioner had given birth before changing his sex, the principle of full legal gender recognition, as well as the need to protect the privacy of the child, outweighed the public interest in assigning a 'biological mother' to each child (Köhler and Ehrt, 2016); (Sørli, 2017). As a result, it can be said that in this case, the sex of the person at the point when the birth took place, became irrelevant, since full gender recognition needs to be given to the person. In the case of questioning the validity of a marriage, many courts have focussed on the sex of the persons at the point of time when the marriage was concluded. In contradistinction, an English High Court, in September 2019 (*The Queen (on the application of TT) v Registrar General for England and Wales* [2019] EWHC 2384), held that a man who gave birth to his son in 2018, could not be registered as the "father" on the child, since he was the person who gave birth to the child and such a person is regarded as the "mother" by the law. An analysis of these cases fall outside the scope of this article but definitely warrants further discussion.

<sup>14</sup> Cassazione Civile, sez. I, sentenza 21/04/2015 n° 8097.

<sup>15</sup> *Hämäläinen v. Finland*, judgment of the Court (Grand Chamber) of 16 July 2014, case number 37359/09, available at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-145768%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-145768%22]}), last accessed 20 July 2020.

perfectly entitled to withhold consent to convert their marriage into a registered partnership, since they both preferred to remain married. A divorce would be against their religious convictions, whilst a registered partnership did not provide the same security as marriage and would mean, among other things, that their child would be placed in a different situation from children born in wedlock (*Hämäläinen v. Finland*, 2014). Both the Finnish courts, as well as the ECtHR<sup>16</sup> rejected this claim, finding that that registered partnership offered the applicant and her family a similar level of protection to that afforded by marriage. Further, had her claim had been accepted, that would have led to the recognition of a *de facto* same-sex marriage (Köhler and Ehrt, 2016, p.57). The Court examined the particular arrangements that were in place in Finland and concluded that they were sufficiently protective of the couple's interests. As a result, there was no violation of Article 8 of the ECHR.

In a dissenting opinion, three judges found that the applicant lacked a real choice in this matter, emphasising the problematic practice of setting two human rights, namely the right to legal gender recognition and the right to marriage, against each other. To their mind, the majority did not sufficiently consider the role of the applicant's and her wife's religious convictions against divorce, nor did it reflect on the emotional hardship that the dissolution of this marriage would cause the couple (*Hämäläinen v. Finland*, 2014); (Open Society Foundations, 2014). The preservation of their marriage, which was a *fait accompli*, did not hurt public morals in any way, others' rights and freedoms would be unaffected if the trans applicant and her wife remained married, and the institution of marriage would not be jeopardized (*Hämäläinen v. Finland*, 2014); (Open Society Foundations, 2014); (Köhler and Ehrt, 2016).

### 3. *MB v Secretary of State for Work and Pensions*<sup>17</sup>

#### 3.1 *The Gender Recognition Act 2004 of the United Kingdom*

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<sup>16</sup> At paras 84-85.

<sup>17</sup> *MB v Secretary of State for Work and Pensions*, judgment of the Court (Grand Chamber) of 26 June 2018, ECLI:EU:C:2018:492, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=203337&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&ci>, last accessed 20 July 2020, hereafter the *MB* decision.

Since 2004, the United Kingdom's (UK) Gender Recognition Act (GRA) has enabled transgender persons over the age of 18 to apply for a Gender Recognition Certificate if such a person had been living in the other gender or changed gender in the UK or under the law of a country or territory outside the UK.<sup>18</sup> In terms of sections 2 and 3 of the GRA, a person must: have or must have had gender dysphoria; have lived in the acquired gender throughout the period of two years ending with the date on which the application is made; intend to continue to live in the acquired gender until death, and submit several supporting documentation from medical practitioners. Section 3 further requires, *inter alia*, from the applicant a statutory declaration as to whether or not the applicant is married.<sup>19</sup> Prior to amendments in 2014, the GRA provided that, should a successful applicant have been unmarried, he or she would have been issued a full gender recognition certificate, entitling such a person to assume "the acquired gender" for all purposes.<sup>20</sup> However, should an applicant have been married, an interim gender recognition certificate would have been issued.<sup>21</sup> A full gender certificate would have only been issued upon the annulment of the marriage of the applicant.<sup>22</sup>

### 3.2 The facts

MB, assigned male at birth in 1948, married her wife in 1974. She began to live her life as a woman in 1991 and in 1995 underwent sex reassignment surgery.<sup>23</sup> MB and her wife wish to remain married and for this reason, she never was able to receive a full certificate of her change of gender. As a result, even though her physical, social and

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<sup>18</sup> S 1 of the GRA. For the purposes of this article, the version that was applicable to the facts of the MB case, will be discussed. The GRA does not provide for a new birth certificate to be issued to such a person, as is the case in terms of the South African Alteration of Sex Description and Sex Status Act. The GRA has been amended on a number of occasions.

<sup>19</sup> S 3(6)(a). In 2005 the provision was amended to also require a declaration if the person was a partner in terms of the Civil Partnership Act 2004.

<sup>20</sup> S 4(2) read with s 9(1). The "acquired gender" is explained as "so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman".

<sup>21</sup> S 4(3). S 4 has been amended by the Marriage (Same Sex Couples) Act 2013 and it now provides that a full gender recognition certificate may be issued to a married applicant if their spouse consents. See also (Hamilton, 2019).

<sup>22</sup> In terms of Schedule 2 of the GRA. The court that granted the decree of nullity, also had to issue the full gender recognition certificate in terms of s 5 of the GRA.

<sup>23</sup> The term used by the CJEU at para 16 of the judgment.



psychological features met the requirements of the GRA, she was still considered a man, merely because she did not want to have her marriage annulled.<sup>24</sup>

In 2008, MB turned 60. In terms of UK legislation applicable at the time,<sup>25</sup> a woman born before 6 April 1950 became eligible for the State retirement pension at the age of 60. A man born before 6 December 1953 became eligible at the age of 65. MB's application for such a pension was denied on 2 September 2008, based on the fact that, in the absence of a full gender recognition certificate, she could not be treated as a woman for the purposes of determining her statutory pensionable age.<sup>26</sup> MB's appeals against this decision were also dismissed by the First-tier Tribunal, the Upper Tribunal and the Court of Appeal.<sup>27</sup>

Upon MB's appeal to the Supreme Court of the United Kingdom in 2016, the Secretary of State for Work and Pensions submitted that, in terms of European case law<sup>28</sup> and the ECHR, States are required to recognise the acquired gender of transsexual persons, but not required to allow marriages between same-sex couples. It was argued that maintaining the traditional concept of marriage as being a union between a man and a woman could justify making recognition of a change of gender subject to such a condition.<sup>29</sup> The Supreme Court was divided on the matter and decided to stay the proceedings at national level, referring the matter to the CJEU for a preliminary ruling. As a result, the CJEU was tasked with answering this question:

“Does Council Directive 79/7/EEC preclude the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who has changed gender must also be unmarried in order to qualify for a State retirement pension?”<sup>30</sup>

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<sup>24</sup> In terms of s 11(c) of the Matrimonial Causes Act 1973, in its version applicable to the case, a valid marriage could legally exist only between a male and a female. The Marriage (Same Sex Couples) Act 2013 only came into force on 10 December 2014.

<sup>25</sup> Section 44, read with section 122 of the Social Security Contributions and Benefits Act 1992, and read with Schedule 4, paragraph 1, of the Pensions Act 1995.

<sup>26</sup> Paras 16 to 19 of the judgment.

<sup>27</sup> Para 20.

<sup>28</sup> It was submitted that in the case of *Hämäläinen v Finland*, CE:ECHR:2014:0716JUD003735909 (ECtHR, 16 July 2014) the European Court of Human Rights recognised that Member States may make recognition of a change of gender conditional on the annulment of that person's marriage. See para 24 of the MB decision.

<sup>29</sup> Para 24.

<sup>30</sup> Para 25.

### 3.3 The judgment

The CJEU made it clear that the question that it had to answer, concerned “only the conditions for entitlement to the State retirement pension” and not whether the legal recognition of gender change may be conditional on the annulment of a marriage entered into before that change of gender.<sup>31</sup> In this respect, the CJEU conceded that EU law does not detract from the competence of Member States in matters of civil status and legal recognition of the change of a person’s gender. However, Member States still have to comply with EU law when exercising that competence, and, in particular, with the provisions relating to the principle of non-discrimination.<sup>32</sup> Article 4 of Council Directive 79/7/EEC provides that “there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status”.<sup>33</sup> This means that one person cannot be “treated less favourably on grounds of sex than another person is, has been or would be treated in a comparable situation”.<sup>34</sup>

The Court found that in this case, access to pension funds were made dependent on the annulment of marriage: due to the provisions of the GRA, access to a State retirement pension by persons who have changed gender depended on the annulment of the marriage into which they may have entered before that change. By contrast, that marriage annulment condition did not apply to persons who have retained their birth gender and are married.<sup>35</sup> The purpose of the marriage annulment condition<sup>36</sup> was unrelated to the pension scheme.<sup>37</sup> As a result, the Grand Chamber of the CJEU came to the conclusion that the national legislation provided less favourable treatment to persons who changed gender after marrying, than to persons who did not change gender and remain married, even though such persons are in comparable

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<sup>31</sup> Para 27.

<sup>32</sup> Para 29.

<sup>33</sup> Council Directive of 19 December 1978: On the progressive implementation of the principle of equal treatment for men and women in matters of social security (79/7/EEC), available at <https://eur-lex.europa.eu/eli/dir/1979/7/oj> (last accessed on 6/12/2018).

<sup>34</sup> The Court referring at para 34 to the definition of “direct discrimination” as found in Article 2(1)(a) of Directive 2006/54/EC of The European Parliament and of The Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

<sup>35</sup> Para 36.

<sup>36</sup> Namely to avoid marriage between persons of the same sex.

<sup>37</sup> Para 46.

situations.<sup>38</sup> The Court held that this discrimination based on sex was prohibited by Directive 79/7.<sup>39</sup>

#### **4. *KOS v Minister of Home Affairs***

##### *4.1 The Alteration of Sex Description and Sex Status Act*

In September 2017, the Western Cape Division of the South African High Court delivered a judgment in which it essentially directed the Department of Home Affairs to adhere to and execute its legislative duties. In order to understand the facts of this decision, the provisions of and the clear facilitation of the implementation of rights in terms of the Alteration Act, must first be understood. It must also be emphasised that the provisions of this act came into operation in March 2004. In terms of section 2(1), a “person whose sexual characteristics have been altered by surgical or medical treatment or by evolvment through natural development resulting in gender reassignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register”. This means that the person will be able to change the descriptor originally affixed to his or her birth certificate to the one which more accurately describes the sex with which the person identifies. Such an application must be accompanied by certain documentation, which may include reports by medical practitioners and psychologists or social workers.<sup>40</sup> The Alteration Act also clearly provides that the consequences of a successful application for the alteration of someone’s sex description are that, from the date of the recording of the alteration, such a person will be deemed for all purposes to be a person of the “new” sex description.<sup>41</sup> Of particular importance for the purposes of the topic in the *KOS* matter, is section 3(3), which stipulates that any rights and obligations that have been acquired by or accrued to such a person before the alteration of his or her sex description, are

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<sup>38</sup> Para 48.

<sup>39</sup> Para 52.

<sup>40</sup> S 2(2) of the Alteration Act. Should the application be refused, in terms of s 2(3) – (5) of the Act, the Director-General must furnish reasons for the decision and the applicant may appeal to the Minister of Home Affairs for assistance. Should the appeal be refused, the applicant may, in terms of s 2(6) – (10), turn to the magistrate of the district in which he or she resides for an order directing the change of his or her sex description.

<sup>41</sup> S 3(2).

not adversely affected by the alteration. The Act clearly does not apply with retrospective effect.

#### 4.2 *The facts*<sup>42</sup>

The first, third and fifth applicants in the matter were all persons who sought to alter their sex description in terms of the Alteration Act. Their respective spouses were the second, fourth and sixth applicants.<sup>43</sup> The first, third and fifth applicants married their spouses prior to surgical and/or medical treatment that altered their sexual characteristics. The first applicant, KOS, was born in 1981 and raised as a male but stated that she “always knew that [she] was different”.<sup>44</sup> She married the second applicant in 2011, a year before she was diagnosed with gender dysphoria. She had been on hormone therapy since 2013, in preparation to her gender reassignment surgery. In March 2014, exactly ten years after the coming into operation of the Alteration Act, KOS, accompanied by her wife, went to the Department of Home Affairs’ offices in George. Here she submitted her application in terms of the Alteration Act to have her sex description on her birth certificate changed. The first official whom they approached at the offices, told them that it was impossible to alter her gender<sup>45</sup> and that it “must be an offence of some kind”.<sup>46</sup> Not even upon being presented with a copy of the Alteration Act, which KOS and her wife took with them, could the official be persuaded to accept her application. Eventually the couple managed to find an official who accepted her application, where after it disappeared

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<sup>42</sup> Although the facts of this case are very similar to the set of circumstances that are of application in the other matters, discussed above, it is important to provide considerable detail of the treatment and responses which the applicants in the KOS matter were exposed to, in order to illustrate the argument that despite legislative instructions, governmental officials still have the power to impose their own bias and prejudice.

<sup>43</sup> Gender Dynamix, a registered non-profit organisation seeking the promotion, advancement, and defence of the rights of transgender and “gender non-conforming” persons in South Africa, joined the matter as the seventh applicant. See para 26 of the judgment.

<sup>44</sup> Para 33.

<sup>45</sup> The term used at para 34 of the judgment, despite the acknowledgement by the Court in fn 22 (of para 20) that the terms “sex” and “gender” is often (incorrectly) used interchangeably. The Court referred to the correct descriptors provided by Albertyn and Goldblatt, “Equality” in Woolman and Bishop (eds) *Constitutional Law of South Africa* 2<sup>nd</sup> ed, at 35-55, at para 20 (fn 22) of the judgment, explaining that “‘sex’ is generally taken to mean the biological differences between men and women, while ‘gender’ is the term used to describe the socially and culturally constructed differences between men and women.”

<sup>46</sup> Para 34.

into the deep and mysterious vaults of the Department of Home Affairs. Several e-mails and phone calls as to the progress of her application produced no results.<sup>47</sup>

During the prolonged period that KOS's application "was mired in bureaucratic inertia",<sup>48</sup> her physical features also took on the form of a woman due to the hormonal treatment that she was receiving. As a result, KOS often found herself in embarrassing situations in which she had to explain why her appearance did not resemble that of the picture presented in her official identity cards. In some instances, people understood her predicament, but in other instances she was met with hostility and suspicion. This caused KOS to withdraw from participation from public life and she left the management of her affairs to her wife.<sup>49</sup>

In April 2015, when KOS approached the regional departmental headquarters in Cape Town, she was eventually told that the Head Office in Pretoria had no record of her application. Thankfully, KOS received some co-operation from the officials working in the Cape Town office, and a copy of her application was faxed to Pretoria on two occasions. In June 2015, the Head Office advised that they needed more information in the form of expert reports; in particular, a letter from a medical doctor stating that "the operation was done",<sup>50</sup> even though reassignment surgery is not a requirement for relief in terms of the Alteration Act. Four months later, KOS was told that it had been ascertained that she was married and that the application could not be processed without proof that she had obtained a divorce. The reason given was that two women could not be married to each other. Upon challenging this statement,<sup>51</sup> the couple was told that the problem related to the Department's computer system,<sup>52</sup> which would not allow KOS's identity number to be changed while she remained registered as having been married under the Marriage Act.<sup>53</sup> It

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<sup>47</sup> Paras 35 – 36.

<sup>48</sup> Para 36.

<sup>49</sup> Para 36.

<sup>50</sup> Binns-Ward J quoting the words contained in the letter at para 39 of the judgment.

<sup>51</sup> Since 2006, persons of the same sex are able to conclude a marriage or civil partnership in terms of the Civil Union Act 17 of 2006 (hereafter the Civil Union Act).

<sup>52</sup> See paras 40, 46 and 50 of the decision.

<sup>53</sup> 25 of 1961, hereafter the Marriage Act. The common law definition of marriage, being "a union of one man with one woman, to the exclusion, while it lasts, of all others", read with s 30 of the Marriage Act, excludes same-sex couples from the ambit of the Marriage Act.

was then suggested that she and the second applicant should go through with divorce proceedings and then remarry in terms of the Civil Union Act.<sup>54</sup>

At this point it must be explained that in South Africa, a person's ID number is made up of (a) his or her date of birth, (b) gender; and (c) South African citizenship status (as well as a serial, index and control number). It does not reflect the person's marital status. However, a person will have to be assigned a new ID number when he or she has altered their sex description.

The third and fifth applicants had similar experiences to that of KOS.<sup>55</sup> GNC underwent reassignment surgery and succeeded in changing her forenames and obtaining an identity document that reflects her appearance as a female, but bizarrely her ID continued to indicate her sex as male. When she applied for an altered birth certificate, she was informed, in July 2016, by the same official who originally first dealt with KOS's application, that the Department's computer system "simply [would] not allow an amendment to [her] gender as [she] was married in terms of the Marriage Act".<sup>56</sup> GNC was also advised to obtain a divorce and to remarry under the terms of the Civil Union Act. GNC explained in her affidavit that she saw "no need to get a divorce to satisfy a computer system".<sup>57</sup> It was argued that to apply for an order for divorce, claiming that irretrievable breakdown of their marriage had taken place,<sup>58</sup> would amount to perjury. In the circumstances, GNC's application to have her sex description changed, had effectively been refused.

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<sup>54</sup> In terms of this piece of legislation, two persons, including persons of the same sex, but above the age of 18 may enter into a "voluntary union" and register it "by way of either a marriage or a civil partnership". In terms of s 13 of this act, "the legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union". Therefore, in theory, couples who are of the same sex, are entitled to exactly the same rights and consequences as that which couples of the opposite sex have, except that same sex couples have to get married in terms of a different piece of legislation. The formalities for entering into a valid civil union and marriage, prescribed in terms of the Civil Union Act, are exactly the same as those prescribed by the Marriage Act, except for the fact that spouses have to be over the age of 18 in terms of the Civil Union Act. In terms of the Marriage Act, girl children as young as 12 may get married, provided that the necessary consent had been obtained from the relevant authorities.

<sup>55</sup> GNC married her wife in 1988 and a daughter was born to them in 1992. She disclosed her situation to her wife only in 2014. The fourth applicant was always understanding of GNC's situation and supported her decision to transition.

<sup>56</sup> Para 46. It would appear as if the Department of Home Affairs, in this instance, was guilty of the practice of "dead-naming" GNC, i.e. using the old name or pronoun of a transgender individual intentionally. (Henzel, 2016).

<sup>57</sup> Para 46.

<sup>58</sup> As required by s 4 of the Divorce Act, 70 of 1979.

In the case of the fifth applicant, WJV, an official at the Roodepoort offices of the Department of Home Affairs advised her that it would be better to use a two-stage process: first she had to have her names changed; hereafter she could apply to have her sex description altered. The official advised that trying to achieve both objectives together would “confuse the system” and be likely to cause “a slowing and/or stalling of the application”.<sup>59</sup> She took this advice but, alas, the system was still confused and slow. Eventually in October 2015, WJV was invited to come to the Department’s office in Roodepoort as her documents were ready. Upon her arrival at the office, WJV was handed a letter confirming that her gender had been changed. Her wife, however, was informed that she was required to obtain a replacement identity card. It was explained to them that as a consequence of the registration of WJV’s sex/gender change, the Department had had to delete its record of their marriage — so the Department’s system now reflected that they had never married — and that the sixth applicant’s surname had therefore reverted to her maiden name. They were advised that they were free to marry under the terms of the Civil Union Act, and told that the Department would be willing to facilitate the solemnisation of a marriage between them in terms of this Act. It must be emphasised that in this instance the Department of Home Affairs took a different approach by granting the application in terms of the Alteration Act but also took it upon themselves, without cause or legal basis, to ‘merely’ delete the couple’s marriage from their records.

#### 4.3 *The judgment*

Binns-Ward J found that there is “nothing in the Alteration Act itself that expressly or impliedly indicates that an applicant’s marital status has any bearing on the ability or entitlement of a person who has transitioned to obtain administrative relief”.<sup>60</sup> In fact, the Minister, Director-General and Deputy Director-General of Home Affairs also conceded to this fact.<sup>61</sup> The judge confirmed that the purpose of the Alteration Act is to facilitate the maintenance of an accurate and meaningfully informative population register. Since it is an offence, in terms of the Identification Act,<sup>62</sup> to fail to obtain a replacement identity card if the current card does not reflect the correct particulars, and since this cannot be done if the population register does not reflect the correct

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<sup>59</sup> Para 50.

<sup>60</sup> Para 73.

<sup>61</sup> Para 72.

<sup>62</sup> 68 of 1997, hereafter the Identification Act.

details, it is imperative that the Alteration Act assists in providing the correct information.<sup>63</sup>

The respondents' main objection to the implementation of the Alteration Act in the circumstances of the applicants, was that it was impossible to reconcile the changed sex of people who wanted to remain married in terms of the Marriage Act. They contended that the Marriage Act does not allow for and apply to a marriage that "was concluded as heterosexual and subsequently became same-sex". As a result, and since there is a "parallel regime of the law governing marriage", the applicants should have been married in terms of the Civil Union Act.<sup>64</sup> To this argument, Binns-Ward J responded that, in South Africa, there is "no parallel system of civil marriage, ... ; there is only a parallel system for the solemnisation of marriages."<sup>65</sup> When people are married in terms of the Marriage Act, they make exactly the same promise as people who are married in terms of the Civil Union Act.<sup>66</sup> The consequences of marriages concluded in terms of the Marriage Act are also exactly the same as for those marriages concluded in terms of the Civil Union Act, even though such consequences are determined (predominantly) by the common law and not by the Marriage Act or Civil Union Act. Furthermore, the Marriage Act "does not contain anything prohibiting a party to a marriage duly solemnised in terms of the formula prescribed in s 30(1) from undergoing a sex-change or obtaining an altered birth certificate in terms of the Alteration Act".<sup>67</sup> As a result, the marriages of the applicants remained valid, despite the alteration of one of the spouse's sex, and could only have been terminated through death or divorce.

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<sup>63</sup> From a practical perspective, the Court explained how important identification documents are in daily life. It is incredibly frustrating, embarrassing and sometimes also degrading or even dangerous for someone whose sex characteristics have been altered to be forced to keep a card showing their original sex with a photograph depicting them as a person of the opposite sex to that which they actually appear to be. See paras 36, 47, 55, 74 and 75.

<sup>64</sup> Para 63.

<sup>65</sup> Para 85.

<sup>66</sup> The wording of the formula found in s 30(1) of the Marriage Act is the same as that of s 11 of the Civil Union Act, except that gender-neutral terms are used.

<sup>67</sup> Para 82. The Court continued, expressing its doubts as to the constitutional validity of such a possible provision: "Any provision that had such an effect would ... probably be found to offend against the basic rights of everyone to equality because it would be likely to unfairly discriminate against affected parties on one or more of the grounds set out in s 9(3) of the Bill of Rights and also to unjustifiably infringe the right that everyone has to bodily and psychological integrity, including the right to security in and control over their body (s 12(2)(b) of the Bill of Rights)."



The Court also ruled that, even though a computer system found it difficult to cope with the set of facts which presented itself, the problem could easily be solved. In terms of s 38(1)(a) of the Marriage Act, the Minister of Home Affairs could use her regulatory powers to “make provision for an appropriate form to cater for any required amendments to the official records or registers”.<sup>68</sup> The Court found that the Minister could not rely on “any shortcomings in the regulatory record-keeping mechanisms of the Marriage Act” and in doing so, deny transgendered persons their substantive rights under the Alteration Act.<sup>69</sup>

#### 4.4 Effecting the judgment

Apart from creating their own rules or merely blankly ignoring and refusing to comply with their legislative duties,<sup>70</sup> the Department of Home Affairs is also known to ignore court orders.<sup>71</sup> It is reported that by March 2019, the Department had not yet complied with the order by Binns-Ward J in *KOS* (Sloth-Nielsen, 2019). Another judgment by the Gauteng Division of the High Court in a matter which also relates to the rights of a person who changed her sex but was still married at the time of her application, serves as another example where the Department failed to implement clear instructions in a court order. In the decision of *GPCM v Minister of Home Affairs and others*,<sup>72</sup> the Court ordered the Director-General of Home Affairs to, within three weeks of the date of the order (13 July 2017), alter the Applicant's sex description/marker on the birth certificate/register and identity document, reflecting her sex description/marker as female. By May 2019, the Department had not yet given

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<sup>68</sup> At para 84.

<sup>69</sup> Para 84.

<sup>70</sup> In the most recent example, a number of women reported that officials at various offices of the Department of Home Affairs refuse to adhere to married women's specific requests to retain their maiden names on identification documents and despite s 26 of the Births and Deaths Registration Act 51 of 1992 providing this option. In these instances, it is not evident whether or not officials blamed a patriarchal computer system for the lack of compliance but it has been explained that a husband's consent, and in some instances even the woman's father's and stepfather's written permission, was required to enable the officials to perform their duties (Wild, 2019); (Vos, 2019); (Grobler, 2019). This, despite the Department issuing a circular in 2016 stating that “the Department had issued an instruction to officials to allow women to indicate their choice of surname under which they wish to be recorded in the National Population Register following the registration of a marriage” (Department of Home Affairs, 2019). See further examples of lack of compliance with legislative instructions in *Ruyobeza and Another v Minister of Home Affairs and Others* 2003 (5) SA 51 (C); *J v Director-General, Department of Home Affairs* 2003 (5) SA 605 (D); *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA).

<sup>71</sup> As *Minister of Home Affairs v Somali Association of South Africa* 2015 (3) SA 545 (SCA) also illustrates.

<sup>72</sup> *GPCM v Minister of Home Affairs and others*, case number 38909/2017, decision of 16 May 2019 by the North-Gauteng division of the High Court, Pretoria, as yet unreported.

effect to this order, since it was aggrieved by the order and requested reasons for the judgment.<sup>73</sup>

## 5. Analysis

### 5.1 Genderism, transphobia and discrimination

The Merriam-Webster Dictionary defines “transphobia” as an “irrational fear of, aversion to, or discrimination against transgender people” (Merriam-Webster Dictionary, 2019). Hill and Willoughby distinguish between “genderism”, “transphobia” and “gender-bashing”.<sup>74</sup> Genderism is described as:

“an ideology that reinforces the negative evaluation of gender non-conformity or an incongruence between sex and gender. It is a cultural belief that perpetuates negative judgments of people who do not present as a stereotypical man or woman. Those who are genderist believe that people who do not conform to sociocultural expectations of gender are pathological. Similar to heterosexism, we propose that genderism is both a source of social oppression and psychological shame, such that it can be imposed on a person, but also that a person may internalize these beliefs.” (Hill and Willoughby, 2005, p.534).

These internalised beliefs and psychological shame may often lead to reluctance to disclose a trans identity, especially within a marriage. However, it is of course also true that a hidden trans identity and non-disclosure of the reality, may also “reduce the potential for future relationship stability” (Dunne, 2018, p. 219).

“Transphobia” in turn is the:

“emotional disgust toward individuals who do not conform to society’s gender expectations. Similar to homophobia, the fear or aversion to homosexuals ... transphobia involves the feeling of revulsion to masculine women, feminine men, cross-dressers, transgenderists, and/or transsexuals. Specifically, transphobia manifests itself in the fear that personal acquaintances may be trans or disgust upon encountering a trans person. ... The “phobia” suffix is used to

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<sup>73</sup> See para 3 of the Court’s judgment.

<sup>74</sup> Gender-bashing is a fear which manifests itself in “the assault and/or harassment of persons who do not conform to gender norms” (Hill and Willoughby, 2005, p. 534).

imply an irrational fear or hatred, one that is at least partly perpetuated by cultural ideology.” (Hill and Willoughby, 2005, pp533-534).

It is submitted that the applicants in the South African case of *KOS v Minister of Home Affairs* experienced genderism and transphobia at the hands of some of the officials at the Department of Home Affairs who presented this ideology and disgust, especially the official who told KOS that changing one’s sex “must be an offence of some kind”.<sup>75</sup> The treatment that the applicants had to endure from this governmental department amounts to social oppression and it caused them much psychological shame.

However, it is further submitted that requiring a person who has changed sex to terminate their marriage, as well as requiring a conversion of a marriage into “a comparable institution”<sup>76</sup> amounts to both genderism and homophobia, and ultimately unjustifiable discrimination. In the words of Sharpe, “[t]hese are not normative ideas that law should support” (Sharpe, 2012, p. 39). In fact, it is submitted that it is the task of the law to eradicate such ideas by implementing regulatory mechanisms which support and promote the rights of those who do not conform to the sociocultural expectations.

While the CJEU found that the UK legislation discriminated against MB, the Court was not competent to answer the question as to whether “the legal recognition of gender change may be conditional on the annulment of a marriage entered into before that change of gender”.<sup>77</sup> Although the underlying cause of MB’s problems remained unaddressed, the MB case is to be welcomed because it succeeded in alleviating at least some of the detrimental effects of the divorce requirement. While it admittedly falls outside the jurisdiction of the CJEU, it is rather disappointing, to say the least, that the argument could be submitted in the Supreme Court of the UK in 2016 that States are required to recognise the acquired gender of transsexual persons, but not required to allow marriages between same-sex couples. In demarcating marriage as an institution that is exclusively available to persons of the

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<sup>75</sup> See para 34 of the judgment, and 4.

<sup>76</sup> As was required and endorsed by the ECtHR in the Finnish case of *Hämäläinen v Finland*, see 15 above.

<sup>77</sup> Para 27 of the *MB v Secretary of State for Work and Pensions* decision, and 33 above. See also (Sloth-Nielsen, 2019) explaining at 8 that in *Hämäläinen v Finland* “[t]he starting point for the European Court was to reiterate that the ECHR did not impose an obligation on the member states to allow same-sex marriage”.

opposite sex, the law is perpetuating the differential and discriminatory treatment of transsexual and homosexual persons. When requiring the termination of marriage post a change of sex, a state is not only infringing upon the human rights of a group of vulnerable persons but also acting contrary to a number of legal principles.

## 5.2 Forced divorce and the law

Although not binding in terms of international law, the third principle of the Yogyakarta Principles<sup>78</sup> clearly states that “[n]o status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity.” The World Professional Association for Transgender Health (WPATH) similarly states “that marital and parental status should not be barriers to recognition of gender change” (The World Professional Association for Transgender Health, 2017). In Europe, both the current and former Council of Europe Commissioner for Human Rights have criticised gender recognition provisions that force trans people to divorce their spouses. In 2009, Thomas Hammarberg recommended that member states “remove any restrictions on the right of trans persons to remain in an existing marriage following a recognised change of gender” (Open Society Foundations, 2014, p. 7). In addition, Commissioner Hammarberg’s 2011 report recommended that member states “respect the right of transgender persons to effectively exercise their right to marry in accordance with their legally recognised gender” (Open Society Foundations, 2014, p. 7) and that to protect “all individuals without exception from state-forced divorce has to be considered of higher importance than the very few instances in which this leads to same-sex marriages” (Open Society Foundations, 2014, p. 9). In November 2012, Commissioner Nils Muižnieks added his voice to this call when he wrote to the Irish Minister of Social Protection, urging that “divorce should not be a necessary condition for gender recognition as it can have a disproportionate effect on the right to family life” (Open Society Foundations, 2014, p. 7).<sup>79</sup>

To force a couple who are still devoted to each other to terminate their marriage violates their rights to equality and non-discrimination, privacy, dignity, freedom of

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<sup>78</sup> Principles on the application of international human rights law in relation to sexual orientation and gender identity.

<sup>79</sup> See also (Dunne, 2018) at 234-247, arguing that forced divorce causes “an unnecessary and improperly balanced disruption to family life” (at 216).

association, the right to family life and the best interests of their children.<sup>80</sup> The effect that this additional requirement may have on a family who has already had to endure a substantial amount of change, is enormous and the emotional costs should not be underestimated. Rather than dissolving such a marriage, this marriage that “has stayed strong through one partner’s transition should be celebrated” (Open Society Foundations, 2014, p. 3).<sup>81</sup> In addition, as stated above at the introduction of this article, the State has a duty to protect family life and cannot force spouses to enter into a divorce against their will. Further, to my mind it was correctly argued in *KOS v Minister of Home Affairs*, that to force spouses in countries such as South Africa to submit to court that their marriage had broken down irretrievably,<sup>82</sup> would oblige such persons to lie under oath.<sup>83</sup>

Another aspect that cannot be ignored, is the practical consequences of compelling couples to divorce but then to enter into another type of relationship that is recognised by the State as a valid form of “same-sex union”. Apart from the actual costs of a divorce (and the *de facto* perjury mentioned above), questions as to the matrimonial consequences of the forced divorce, and re-entry into another form of marriage will have to be answered. In South-Africa, for example, one can only imagine the logistical nightmare that were to ensue in the instance where a couple is married out of community of property but with the accrual system being applicable to their marital property regime.<sup>84</sup> Tax benefits may be terminated, only to be resumed again. Further, beyond the financial implications, the impact of divorce can be disrupting, “particularly when a spouse’s immigration visa is based on marital status” (Open Society Foundations, 2014, p. 3).

The main justification for requiring a couple to divorce in these circumstances, is that a sex change effectively converts a heterosexual marriage into a same-sex

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<sup>80</sup> See, in particular, (Dunne, 2018, p. 220) citing a number of studies that found that “children suffer where trans couples engage in domestic life”.

<sup>81</sup> (Dunne, 2018, p. 217) refers to Bischof *et al* 2011, who observe the “subtle homophobia that underlies [the] assumption that families or marriages cannot survive gender transition.”

<sup>82</sup> As required by s 4 of the South African Divorce Act. This general and most frequently used ground for divorce, irretrievable breakdown, requires proof of the breakdown of a normal marital relationship, to such an extent that it cannot be restored. The other two grounds for divorce, namely continuous unconsciousness and mental illness, require medical proof and are used less often.

<sup>83</sup> See 4.2 above.

<sup>84</sup> A forced divorce followed by a re-marriage, will cause, for example, the calculation and division of the accrual, only for the transferred amounts to now be used as artificial commencement values for the “new” marriage, potentially prejudicing spouses’ financial positions and rights. For an explanation of this “deferred community of property system”, see ss 3 to 6 of the Matrimonial Property Act 88 of 1984.

marriage. In an ideal world, marriage equality laws should recognise marriages of any two eligible people, regardless of their sex or gender (Open Society Foundations, 2014, p. 5). Accordingly, it is submitted that all of the humiliation, frustration and trauma suffered by, for example, the applicants in the *KOS v Minister of Home Affairs* matter, could have been avoided had the South African government in 2006 rather opted for a single marriage statute, recognising both same-sex and opposite-sex marriage in one piece of legislation, instead of promulgating the “equal but different” Civil Union Act.<sup>85</sup> It is submitted that genderism, heterosexism, homophobia and transphobia were probably the underlying reasons for the introduction of another act. In the words of Binns-Ward J, at para 69 of the *KOS v Minister of Home Affairs* (footnotes omitted):

“[The inconsistent reasoning by the Director-General of Home Affairs] highlights, I think, the confusion that appears to exist in the minds of the respondents and officialdom in the Department concerning the import and effect of the relevant legislation. I regret to say that their approach appears to have been coloured by the persisting influence of the religious and social prejudice against the recognition of same-sex unions that, according to their evidence, was accommodated by the decision not to amend the Marriage Act but to bring in the Civil Union Act alongside it instead. They have not identified a single provision in any of the legislation to which they refer that expressly forbids the processing and positive determination of the transgender spouses’ applications under the Alteration Act. All that they have been able to point to are the socio-religious objections that reportedly influenced the legislature’s decision to introduce the Civil Union Act and leave the Marriage Act unamended. They do not explain why those considerations should, or properly could, weigh to distort the plain meaning of the enactments as they appear in the statute book.”

An amendment to the South African Marriage Act, similar to the 2013 amendment to the New Zealand Marriage Act, defining marriage as “the union of 2 people, regardless of their sex, sexual orientation, or gender identity” (Parliamentary Counsel Office, 2013), would have prevented much anguish and discrimination.<sup>86</sup>

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<sup>85</sup> This dual system of regulation has been the subject of much criticism, amongst others, by (De Vos & Barnard, 2007) and (de Ru, 2010). See also (Sloth-Nielsen, 2019, pp. 12-13) where she discusses the possible impact of the *KOS* matter upon a constitutional challenge to the existence of this system of regulation in terms of two pieces of legislation. She also explains in fn 44 that South Africa is not unique in this regard.

<sup>86</sup> See, however, Project 144 by the South African Law Reform Commission, Issue Paper 35, available at [http://www.justice.gov.za/salrc/ipapers/ip35\\_prj144\\_SingleMarriageStatute.pdf](http://www.justice.gov.za/salrc/ipapers/ip35_prj144_SingleMarriageStatute.pdf), (last accessed 20 July 2020) calling for an investigation and public submissions in respect of proposals for “a single marriage Act that will enable South Africans of different religious and cultural persuasions to conclude legal

Nevertheless, even in instances where marriage or “comparable institutions”<sup>87</sup> are not available to persons who changed their sex, it is submitted that the “point of entry” rule,<sup>88</sup> as applied by the French Rennes Court of Appeal in October 2012, should be followed. In terms of this rule, the validity of a marriage is determined at the time it was concluded. Binns-Ward J never comprehensively discussed the argument in *KOS v Minister of Home Affairs* that the marriage between the applicants became void(able) because one of the material elements, namely two persons of the opposite sex, was subsequently found to have become lacking during the existence of the marriage. The Court found that, in South Africa, there is “no parallel system of civil marriage, ... ; there is only a parallel system for the solemnisation of marriages”; because there is essentially no difference between marriages concluded in terms of the two pieces of legislation; and because there is no provision which provides for the conversion of a marriage in terms of the Marriage Act into a marriage in terms of the Civil Union Act, the marriages of the applicants were valid. In addition, it is submitted that the Court could also have added that the marriages remained valid due to the fact that, at the time of conclusion, they met the conditions of validity set by the legislation in force. If, by means of analogy, one of the spouses of a validly-entered-into-marriage, became mentally ill during the existence of the marriage – thus one of the material elements, namely capacity to act, was now found to be lacking –the marriage would still be valid and would remain so, until terminated through death or divorce.<sup>89</sup>

## 6. Conclusion

The case law discussed in this article are examples of a number of instances where the State attempted to impose divorces on couples who wish to remain married. The crucial difference between the sets of circumstances is that in the South African matter, the requirement was not sanctioned by the legislature but developed by a state department, apparently due to a computer system that could not cope with the data it received. It would appear that in this instance, notwithstanding a piece of legislation

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marriages that will accord with the doctrine of equality as encapsulated in the Constitution of the Republic of South Africa”.

<sup>87</sup> See *Hämäläinen v Finland*, discussed above at 15.

<sup>88</sup> Also referred to as the *Napier* rule in English law, following the decision of *Napier v Napier* [1915] P. 184, 189. See also (Dunne, 2018, pp. 221-222).

<sup>89</sup> See further, (Dunne, 2018, pp. 221-223), analysing both arguments for and against the “point of entry” rule.

enabling the change of a person's sex without the condition of termination of marriage, a lack of artificial intelligence was blamed as being the transphobic culprit.<sup>90</sup>

It is remarkable that in 2016, the Secretary of State for Work and Pensions of the UK could still hide behind the argument that the ECHR does not compel States to recognise same-sex marriages and the CJEU did not have the jurisdiction to decide over the matter in *MB*. It is astonishing to think that the Member States of the EU (or any other jurisdiction) still have the competency to make the recognition of a sex change dependent on the requirement that such a person is not allowed to remain married to their spouse whom they married prior to the change. This article has argued why it is incorrect to impose such a requirement.

However, it has also shown that, even in the absence of such legislation, genderism and transphobia may still deny persons who had changed their sex their rights to equality and non-discrimination, privacy, dignity, freedom of association, the right to family life and the best interests of their children. It appears that, although South African legislation scores "top marks in a global report about fighting homophobia" the country fares poorly "on the ground", leading to the conclusion that progressive legislation and court decisions do "not necessarily change a country's mindset" (Farber, 2019). Although the CJEU may continue to find creative ways to circumvent legislation that impose divorce upon certain couples, and although discriminatory legislation may be amended by court decisions, transphobia and genderism will continue to infiltrate governmental departments for as long as there is a misperception or lack of understanding of the "otherness". In the same way that so many other examples of fear of the unknown and judgement of individuals who do not conform to society's expectations continue to cloud the level of appreciation and acceptance of some members of society, bias will remain the cause of the violation of many rights. However, the law must continue to withdraw its support for these normative ideas, to eradicate rules that treat people differently because of the way they look, dress or express themselves. In the words of the Advocate General in point 104 of his Opinion to the *MB* matter, these cases concern

"unique and singular [realities], which [fit] with difficulty into the traditionally binary divisions on which the prohibition of sex discrimination relies. The circumstances of the case must be placed in that perspective. It concerns a rather limited number of individuals facing profound challenges often in situations of

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<sup>90</sup> Although it is acknowledged that "machine learning" and "AI decision-making" may also create risks of discrimination (Borgesius, 2018).



vulnerability. It has to do with a complex human reality with which individual legal orders have struggled to catch up over time”.

It is the task of the law to allow for different perspectives and protect the vulnerable. It must continue to enable humans to recognise that it is only humans who have the ability to implement or deny other humans their rights. Computers fit into boxes, humans do not.

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